

ENVIRONMENTAL QUALITY COUNCIL

July 28, 2000

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Exhibits are on file at the Legislative Environmental Policy Office.

COUNCIL MEMBERS PRESENT

Sen. William Crismore, Chair
Rep. Kim Gillan, Vice Chair
Rep. Paul Clark
Sen. Mack Cole
Rep. Monica Lindeen
Sen. Bea McCarthy
Sen. Ken Mesaros
Rep. Doug Mood
Sen. Jon Tester

Sen. Spook Stang
Rep. Bill Tash
Rep. Cindy Younkin
Mr. Tom Ebzery
Ms. Julie Lapeyre
Ms. Julia Page
Mr. Jerry Sorensen
Mr. Howard Strause

COUNCIL MEMBERS EXCUSED

None

STAFF MEMBERS PRESENT

Mr. Todd Everts
Ms. Krista Lee
Mr. Larry Mitchell
Ms. Mary Vandenbosch
Ms. Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Approved minutes from EQC meeting of May 5, 2000.
- Adopted the Findings, Recommendations, and Final Reports of the Land Use/Environmental Trends Subcommittee, the Eminent Domain Subcommittee, the MEPA Subcommittee, and the Water Policy Subcommittee.
- Set the next meeting date for September 11 and 12, 2000.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN CRISMORE called the meeting to order at 8:00 a.m. Roll call was noted; all members were present. **(Attachment #2.)**

II ADOPTION OF MINUTES

Motion/Vote: SEN. MCCARTHY MOVED THAT THE MINUTES OF THE MAY 5, 2000, EQC MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

III LAND USE/ENVIRONMENTAL TRENDS SUBCOMMITTEE DRAFT FINDINGS AND RECOMMENDATIONS

A. Review of Findings and Recommendations

MR. SORENSEN recapped that the Subcommittee has been reviewing the implementation of the growth policy legislation in the state. The reports are good. Counties and towns like the legislation passed last session because it gives them a framework to accomplish their goals. Finding appropriate funding is an ongoing struggle. Several sources of funding have been identified. The Subcommittee is looking for \$1 million per year. The counties would be given grants up to approximately \$50,000 per year with a 50% match requirement.

The County Land Planning Fund involves an entitlement that has been granted to the counties based on population and land area. This is approximately \$200,000 per year that is given to 56 counties. This does not result in a large amount of seed money. The Subcommittee recommended that the source of money be placed into a grant pool. The disbursements would be made based on the county's willingness and efforts to prepare growth policies. The Montana Association of Counties (MACo) is opposed to this idea because counties do not want to lose this entitlement.

The General Fund was also considered as a possible funding source. One idea is to appropriate additional revenue from the coal severance tax that is currently utilized for the entitlement funds. Of the 8.36% that is allocated, generally some funds are left over which revert back to the General Fund. They would also like to consider the option of increasing the 8.36% amount and earmark the funds for growth planning. Another possibility is a straight general fund appropriation. One million per year is not a lot of money.

The Subcommittee met with the Director of the Department of Commerce, Dr. Peter Blouke, and the Director of Travel Montana, Matt Cohn, in regard to the bed tax. They were not in favor of pursuing this avenue. Mr. Blouke suggested considering possible funding from the Treasure State Endowment Program. This program funds infrastructure, including water and sewer projects. A portion of this funding may be used for planning and growth policy efforts. It is important to receive the support of MACo and the League of Cities and Towns for using this funding source.

Combining several of the funding sources should provide for the proposed simple grant process for cities and counties to move forward with their growth policy activities. The Subcommittee also will be contacting the Local Government Funding and Structure Committee in regard to the funding the Committee is considering.

B. Council Discussion

SEN. TESTER noted that the plan was for the counties to match the \$1 million amount. He questioned whether the counties had the matching funds. MR. SORENSEN explained that the feedback from the counties is that they strongly support funding for growth policy and indicated a willingness to match the funding.

SEN. TESTER questioned whether the Subcommittee reviewed whether or not any private funds may be available. SEN. SORENSEN noted that the Subcommittee did not review this option. This was reviewed last interim and there did not seem to be funds available.

SEN. STANG added that SB 97 does allow for private contributions to be used. He added that in regard to the funding issue, he was the dissenting vote on using funds which are currently an entitlement and distributing these funds through the grant process. A lot of the smaller rural counties use the entitlement funds to fund their planning process and they would be unable to compete with the larger counties for the grants.

SEN. COLE stated that this could be detrimental to small counties because they would not be able to compete for the funds. In regard to changing the funding allocation for the 8.36% coal tax funds, there will be resistance from the coal mining counties. MR. SORENSEN stated that the coal tax fund is an appropriate funding mechanism. The trust was set up to set aside money for Montana's future. In regard to the problems of smaller counties, the funding currently going to these counties is not large enough to help the counties plan pro-actively. The grant program would be very simple and would not put the smaller counties in competition with the larger counties. The program would review the needs and interests of the communities.

REP. TASH questioned how many counties were actively involved in updating their comprehensive plans. MR. SORENSEN believed this would include 20 to 30 counties. There has been renewed interest since the passage of SB 97.

C. Council Decision on Findings and Recommendations and Approval of Subcommittee Report

Motion/Vote: SEN. MCCARTHY MOVED THE ADOPTION OF THE REPORT OF THE LAND USE/ENVIRONMENTAL TRENDS SUBCOMMITTEE. THE MOTION CARRIED UNANIMOUSLY.

IV EMINENT DOMAIN DRAFT FINDINGS AND RECOMMENDATIONS

A. Review of Findings and Recommendations

SEN. COLE noted that the Subcommittee also included three members from the Law, Justice and Indian Affairs Committee. Some of the issues discussed were very controversial and dealt with specific projects. The decisions made by the Subcommittee were not unanimous decisions. Chapters 1-6 of the Final Report were adopted unanimously by the Subcommittee. Chapter 7, the Subcommittee's findings and recommendations, was set up in a matrix form, **Exhibit 1**, with the "Comments" section including minority reports on certain issues. Under the issue of "use of interest taken", there was a lot of discussion and the Subcommittee proposed legislation (LC7033) to be voted on by the full EQC in September. Proposed legislation was also discussed under the issue of "type of interest taken" (LC7035). Draft legislation to clean-up the eminent domain statutes passed the Subcommittee unanimously (LC7032). A handbook has been prepared to provide information to the public in regard to the eminent domain process. Under the issue of "mitigation measures" it was recommended that the full EQC work on draft legislation (LC7036). The Subcommittee was in favor of the concept but did not agree on the draft legislation.

B. Council Discussion

SEN. TESTER questioned whether the Subcommittee researched the timeliness of the eminent domain process. SEN. COLE explained that the process involves the court system which can vary the length of time involved.

SEN. TESTER questioned whether the project moved forward if there were unresolved issues. SEN. COLE stated that the process continues but the issues may continue to be unsettled. MS. LEE explained that the timeliness of the condemnation proceedings partially depended on the district court schedule. In regard to possession of property, the condemnor may take possession of the property upon payment into the court of the amount of money which the condemnee claimed in the statement of just compensation. If the court decides that the project was not in the public's best interest, the project would need to be terminated. If there was damage to the property, the property owner would be able to pursue damages in court.

SEN. TESTER requested an example of this situation. MS. LEE stated that the Subcommittee heard testimony regarding the court deciding that the taking was not necessary for the project. Once this determination was made by the court the condemnor could not acquire this parcel of property through condemnation. In this example, the landowner was paid the additional amount and the project continued.

REP. TASH stated that the necessity hearing held by the court was discussed by the Subcommittee. The determination of necessity is important for securing highway funding. It may be necessary for this process to move on a faster track in regard to highway funding since the state may have to forfeit the unused funds to other states.

SEN. TESTER raised a concern if the project were to go through the middle of someone's land and make it very difficult to operate. The damage resulting from a project may be irreparable. MS. PAGE explained that this issue was discussed at length. Landowners expressed concern that they were unable to get at the issue of whether a project was necessary or in the public interest because the landowner has a very slim opportunity to question that aspect of the process. If the project has the right of eminent domain and it goes through the middle of your ranch, that's too bad. The landowner does not have much leverage for negotiating, going to the edge of the property, or avoiding a spring. The Subcommittee debated the ability of the landowner to question the appropriateness of a project. Draft legislation was presented at the Subcommittee meeting that would have suggested that in the stage of the preliminary condemnation order, the condemnor would need to prove that the project was in the public interest. Criteria was set out for the court to use. The draft legislation did not survive.

MR. EBZERY added that a pipeline or a railroad would be a part of a major project which would have been authorized by a federal authority. The statutes require need to be proven. In the instance of the Tongue River Railroad, there were five opportunities for public comment. There are plenty of procedural safeguards and opportunities for landowners to negotiate.

REP. GILLAN noted that in regard to what has been brought out by landowners, there is a disconnect between the statutes and what has been established in case law. Hopefully the handbook will provide some assistance to the landowners. Many people felt that they did not have the full benefit of the law.

MR. STRAUSE noted that the finding under the "necessity/public interest" section of the report is that public interest is not specifically defined in statute. He questioned whether other states have defined the term. MS. LEE explained that the issue was not directly researched. The research, in regard to other states, involved public uses and entities who are authorized to exercise eminent domain. The Subcommittee attempted to define language that could be used by the courts in determining if a project is in the public interest. This bill draft did not survive.

MR. STRAUSE noted that before some projects move forward, public interest is reviewed by federal agencies. He questioned why the state would not have that same authority. REP. TASH remarked that the other agency involvement include both the Montana Environmental Policy Act (MEPA) and the National Environmental Policy Act (NEPA). Regulatory enforcement is included in determining necessity.

MR. STRAUSE believed that MEPA may not be the answer if it is interpreted procedurally.

MR. EBZERY stated that the issue of need is a criteria in federal projects. Montana statutes address necessity in that the property taken is the amount needed for the project, etc. There is a confusion of terms in relation to "necessity" and "need" as to whether or not the project is in the public interest. Some proponents wanted

to include a public interest criteria to make a determination of whether or not the project should go forward. The Subcommittee disagreed on what constituted public interest.

Greg Petesch, Legislative Services Attorney, explained that the eminent domain law refers to public interest in two areas. The first involves the facts necessary to be found before a condemnation order is granted. The statutes hold that before property can be taken, the condemnor must show, by a preponderance of the evidence, that the public interest requires the taking based on four enumerated criteria. The criteria includes: 1) the project is on the list of public uses for which property can taken, 2) the specific taking is necessary for the project, 3) a written offer is made to the landowner and he rejects the offer, and 4) if a property is already dedicated to a public use, the public use being sought is more necessary than the existing public use. Also, in the preliminary condemnation order, the court must find, from the evidence presented, that the public interest requires the taking of property and that the condemnor has met the burden of proof under the enumerated criteria. There are no Montana court decisions that address public interest. Section 70-30-111 states that if the criteria is met, public use has been met.

MR. STRAUSE noted that under the section on mitigation measures there was a statement in the comments that landowners feel there appears to be a double standard when projects cross both public and private land. MS. PAGE explained that this issue was brought to the Subcommittee by landowners who felt that they were not able to negotiate mitigations for their property. On federal and state lands proposed to be crossed on the same project, there were additional mitigation measures. It was also pointed out that there is a different standard for federal and state lands in that compensation is not paid for the taking of the easement on federal and state lands.

REP. LINDEEN commented that it is evident that there are Montana landowners who believe the eminent domain process is out of balance and that reform is needed to ensure a fair balance between the parties.

C. Council Decision on Findings and Recommendations and Approval of Subcommittee Report

Motion/Vote: SEN. MCCARTHY MOVED THE ADOPTION OF THE FINDINGS, RECOMMENDATIONS AND THE FINAL REPORT OF THE EMINENT DOMAIN SUBCOMMITTEE. THE MOTION CARRIED UNANIMOUSLY.

CHAIRMAN CRISMORE explained that the draft legislation will be sent out for public comment and the full EQC will take action on the drafts at its September meeting.

V MEPA SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

A. Review of Findings and Recommendations

SEN. MCCARTHY reported that the Subcommittee solicited public involvement on the MEPA issues.

MR. EVERTS provided a copy of Chapter 10 of the MEPA Final Report, **Exhibit 2**. He reviewed the document explaining the new language (underlined) and the deleted language (strikeout).

In regard to the costs/benefits section, the Subcommittee found that it would be useful to know this information because it is discussed during every legislative session. Public comment was universal in that it would be a good idea to know the costs and benefits but it would not be worth the effort in terms of the Subcommittee's recommendations to accomplish this task. A recommendation is that the state agencies, through administrative rule making, should develop uniform guidelines for determining project costs for environmental impact statements (EISs). Also, the EQC, in an interim study, should review the statutory fee schedule for project costs.

The Subcommittee worked with the Montana Consensus Council (MCC). The MCC wrote Chapter 9 of the report. They conducted an extensive survey of the constituent's involvement in the process and provided recommendations to the Subcommittee (pages 172-175).

In regard to the implementation of MEPA, the Subcommittee recommended that the Legislature define whether MEPA is a substantive or procedural law, or both. Also, the EQC, in an interim study, should study the use of programmatic EISs and EAs.

The Subcommittee noted that some of the definitions in the agencies' MEPA administrative rules may need to be clarified and some terms may need to be further defined. The EQC should draft cleanup legislation to ensure internal consistency between § 75-1-201(3)(a) and § 75-1-201(3)(b).

B. Council Discussion

REP. TASH questioned whether the Subcommittee received input from federal agencies involved in the NEPA process. SEN. MCCARTHY stated that they did not receive or request information from federal agencies.

SEN. COLE questioned whether the Subcommittee made any significant changes in the timeliness of the process. MR. EVERTS stated that staff analyzed the mining permits, timber sales, and the alternative livestock permits. The Subcommittee found that timeliness was only an issue in a small number of activities but the delays in those small number of significant activities were substantial. It was noted that improvement in the public participation process would assist timeliness. Project size, complexity, and significance plays into the length of time involved in the permitting process. The possibility of a one-stop shopping process for permits was discussed. An interim study would be necessary to review the one-stop shopping issue.

MR. STRAUSE maintained that in regard to the timeliness issue it was found that NEPA also causes delays in the process. NEPA does not include the time limitations that are in Montana statutes. He added that the Western Environmental Trade Association suggested that they be more informed about the process and that

there was no need for alternatives to be discussed which the proponents of a project did not believe were appropriate because they would not follow through on these alternatives. The Subcommittee recommended that the agencies consult with the proponents of a project on the alternatives so time is not taken up reviewing alternatives that are impractical.

REP. MOOD stated that there is an issue in regard to time limits. A number of people stated that there was no consistency amongst the agencies in regard to public notice. Applying MEPA substantively or procedurally was discussed at great length. It was noted that it is applied substantively in certain instances where the underlying permitting law is inadequate. He suggested that the problems resulting from MEPA are the result of its brevity. This brevity has lead to litigation and needs to be addressed by the Legislature.

C. Council Decision on Findings and Recommendations and Approval of Subcommittee Report

Motion/Vote: SEN. MESAROS MOVED THE ADOPTION OF THE FINDINGS, RECOMMENDATIONS AND THE FINAL REPORT OF THE MEPA SUBCOMMITTEE. THE MOTION CARRIED UNANIMOUSLY.

VI WATER POLICY SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

A. Review of Findings and Recommendations

SEN. MCCARTHY stated that the Subcommittee decided to adopt the first four chapters of the draft report. Chapter 5 of the draft report contained recommendations that the Subcommittee did not adopt.

SEN. TESTER remarked that draft legislation was considered that would help limit large swine facilities from coming into the state. All comments received were negative so the Subcommittee did not adopt the draft legislation or any draft recommendations.

B. Council Decision on Findings and Recommendations and Approval of Subcommittee Report

Motion/Vote: SEN. STANG MOVED ADOPTION OF THE FINAL REPORT OF THE WATER POLICY SUBCOMMITTEE. THE MOTION CARRIED UNANIMOUSLY.

VII RENEWABLE RESOURCE GRANT AND LOAN PROGRAM REPORT AND THE RECLAMATION AND DEVELOPMENT GRANTS PROGRAM REPORT

John Tubbs, Department of Natural Resources and Conservation (DNRC), reviewed the DNRC RIT Grant Programs, **Exhibit 3.** He explained that this year they received 71 applications for the Renewable Resource Grant and Loan Program and the total funds requested were \$6.9 million. This exceeds available funding by \$3.4 million. In the Reclamation and Development Grants Program they received \$7.5 million of requests in 30 applications. This exceeds the level of funding by \$4.6 million.

Over 30 requests were received for community water and drinking water projects. This is more than normal. Some of the irrigation projects save significantly more water than is consumed by communities. The Carbon County project involves a cost sharing element with a private landowner. This would be the first time the program would give a private landowner grant funds for saving water.

REP. TASH questioned the provisions for water rights in regard to the excess water created. **Mr. Tubbs** noted that they have a successful project in Paradise Valley where the salvaged water was leased back to the Department of Fish, Wildlife, and Parks for instream flow. In the above-mentioned case, the amounts of excess salvaged water would not be very high.

Mr. Tubbs noted that the Montana Department of Environmental Quality (DEQ) has two mine reclamation projects.

REP. LINDEEN remarked that the DNRC's application for a reference guide for Montana's Water Resources in the 20th Century appeared to be out of place in comparison to the rest of the applications. **Mr. Tubbs** stated that it is an eligible grant to be funded but it will need to compete with the other applications.

SEN. MESAROS questioned whether the LaCasa Grande Water and Sewer District application would involve funds going to the developer or the residents of the district. **Mr. Tubbs** clarified that this application was from the residents of the district.

Mr. Tubbs further stated that they have four requests for reclamation funds to clean up water at the Zortman and Landusky Mines. There is a request for the development of a trust fund to assure long-term water treatment at Zortman-Landusky. A grant has not been given in the past for funds to be placed into a trust fund.

The request from the Flathead Basin Commission is the first request that is directly the result of a Total Maximum Daily Load (TMDL). If this is funded, it would involve paying a coordinator. He questioned whether it was the state's responsibility to implement the TMDL or whether this should be the responsibility of the local area.

VIII LEGISLATIVE FINANCE COMMITTEE (LFC) METAL MINE BONDING UPDATE AND LEGISLATION

Gary Hamel, Fiscal Analyst, Legislative Fiscal Division, reported that the Legislative Finance Committee has appointed a Metal Mine Subcommittee to review the suggested solutions to particular problems that were presented in the report to the Legislative Finance Committee (LFC). Discussions have been held with the DEQ in regard to implementation of solutions. He reviewed his memo of May 18th which set out the metal mine performance bonds recommendations adopted by the LFC, **Exhibit 4**.

IX LOCKWOOD SOLVENT SITE/CECRA DRAFT LEGISLATION

MR. MITCHELL stated that the proposed legislative changes which were requested by the EQC have been prepared. He provided a copy of the same, **Exhibit 5**. Some changes made in the 1997 Legislative Session and existing language in the state's superfund law have caused the DEQ to interpret the law as holding that before the department can take remedial action on a site, each and every person that may be liable must be identified and notified. The Lockwood Solvent Site included a very large ground water contamination plume in a suburban area which resulted in a great number of potential sources and all could be liable for the pollution. He further provided a cover memo which described the proposed amendments to the Comprehensive Environmental Clean-up and Responsibility Act (CECRA) and reviewed the same for the Committee, **Exhibit 6**. There is a question as to whether or not the draft legislation should include a retroactive applicability date.

Sandi Olsen, DEQ, explained that the department has not noticed anyone since 1997 so there should be no need for a retroactive applicability date.

The Committee will review the proposed legislative changes and discuss the same at the September meeting.

X OTHER BUSINESS

REP. TASH reported that the Legislative Council on River Governance traveled to Portland to visit the Bonneville Power Administration site. The briefing was relevant to the recent rate spikes. Salmon mitigation efforts and preference power contracts were also discussed.

SEN. COLE requested that the Montana Department of Transportation also present their draft legislation to the EQC at the September meeting. He also provided a handout on WBI Holdings, Inc., **Exhibit 7**. The handout provided information regarding the coal bed methane development. A report on the issue was also requested for the September meeting.

XI CONFIRM LOCATION OF NEXT MEETING AND INSTRUCTIONS TO STAFF

The dates for the next meeting were changed from September 14th and 15th to September 11th and 12th due to a conflict in dates for certain EQC members.

XII ADJOURNMENT

There being no further business, the meeting was adjourned.

SEN. CRISMORE, Chair